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No. 81-2274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JONNET DEVELOPMENT CORPORATION,
Petitioner

v.

RICHARD S. CALIGUIRI, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS' BRIEF DOES NOT DISPUTE THAT THE SEVENTH AMENDMENT JURY TRIAL RIGHT APPLIES TO PETITIONER'S ANTITRUST CLAIM NOR THAT THE DISTRICT COURT DECIDED ISSUES RELEVANT TO THAT CLAIM IN A NON-JURY TRIAL.

Respondents argue (Br. in Opp. 12) that this case presents the "mundane" question of whether petitioner waived its Constitutional right to a jury trial. The guarantees of the Constitution may not be so lightly brushed aside.

A non-jury proceeding has resulted in grave injury to the reputation of petitioner and its president. Criminal prosecution has been suggested by the district court and by counsel for respondent.[1] Petitioner's antitrust claim

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[1] C.A. App. at 133-34. "C.A. App." refers to the Joint Appendix filed with the U.S. Court of Appeals for the Third Circuit.

has been undermined. Common issues essential to that claim have been determined by a judge, not a jury. (See Pet. 9.) Collateral estoppel, based on the district court's non-jury determination, has resulted in respondents' filing of motions to dismiss related state court actions.[2]

Respondents do not dispute that petitioner's claim is legal in nature, nor that issues common to that claim were decided without a jury. Respondents' brief does not dispute any of the foregoing facts, but argues only that petitioner waived its rights. (Br. in Opp. 12-18.) The denial of a significant Constitutional right is virtually conceded by respondents.

II. RESPONDENTS' WAIVER ARGUMENT IS WITHOUT FOUNDATION IN THE RECORD OF THIS CASE.

Respondents do not dispute that petitioner demanded a jury trial in its complaint. They do not challenge the fact that petitioner moved orally and in writing on June 8, 1981, at the commencement of the non-jury trial, that a jury be impaneled. Further, on the following day, petitioner sought a writ of mandamus from the Court of Appeals for the Third Circuit in an attempt to protect its Seventh Amendment right. What else was petitioner to do to protect its rights?

Clearly, petitioner's response to respondent's Motion to Consolidate the Hearing on the Motion for a Preliminary Injunction with the Trial on the Merits expressly reserved petitioner's right to a jury trial. (Pet. 15.) This Court has held the right to a jury trial so fundamental that courts must indulge in "every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy*, 301 U.S. 381, 393 (1937).

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[2] C.A. Supp. App. at 13. "C.A. Supp. App." refers to the Supplemental Appendix filed with the U.S. Court of Appeals.

Respondents rely (Br. in Opp. 13-14) principally on the cases of *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3rd Cir. 1974), and *Southland Reship, Inc. v. Flegel*, 534 F.2d 639, rehearing denied, 539 F.2d 710 (5th Cir. 1976), to support their contention that petitioner waived its right to a jury trial. A review of those cases establishes the deficiencies of respondents' contentions.

In *Fenstermacher*, the plaintiff failed to make a timely demand for a jury trial. The trial court ordered consolidation of plaintiff's application for a preliminary injunction with the final hearing on the merits, and counsel did not object. The consolidated hearing was held, and on appeal, plaintiff *for the first time* asserted that he was denied his right to trial by jury. The Third Circuit, in finding waiver, emphasized the fact that (493 F.2d at 338; footnote omitted)—

> Appellant, however, failed to request a jury trial or to object to consolidation when he must have realized that final adjudication on the merits was taking place absent a jury.

Similarly in *Southland Reship, Inc. v. Flegel, supra*, the plaintiff did not assert that the bench trial denied his right to a jury until the case was on appeal from the unfavorable trial court judgment.

The underlying rationale of decisions such as *Fenstermacher* and *Southland* is sound. Once a party proceeds through a non-jury trial without objection, he should not be able to change his mind after trial is completed and judgment entered. That rationale does not apply to the instant case. Petitioner here made a timely demand for a jury trial and specifically preserved that right in its response to the Motion to Consolidate. Petitioner objected vehemently *prior* to the district court hearing and also sought relief by means of a writ of mandamus. Given these circumstances, application to this case of a rationale

based on cases where objection was not made until appeal, is unwarranted.

Furthermore, nowhere in respondents' brief is there any comment on Rule 39(a) of the Federal Rules of Civil Procedure and its application to this case. (See Pet. 14-16.) Rule 39(a) provides the exclusive procedure by which a timely demand for a jury may be withdrawn. No such written or oral stipulation "in open court" was made in this case. There was, therefore, no waiver as asserted by respondent. As pointed out in the Petition for Certiorari in *Skippy, Inc.* v. *CPC International Inc.*, No. 82-310, now pending before this Court, there is substantial and direct conflict between the circuits on the question of whether Rule 39(a) is the exclusive means of effecting a waiver of a jury demand. See pp. 14-16 of that Petition. Although the facts in this case regarding waiver are somewhat different than in *Skippy, Inc.*, such a conflict on a recurring question of constitutional law should be resolved by this Court.

III. QUESTIONS OF PETITIONER'S TRIAL STRATEGY AND THE FAILURE OF PETITIONER'S COUNSEL TO PRESENT A FULL CASE BEFORE THE DISTRICT COURT ARE IRRELEVANT SINCE THEY OCCURRED SUBSEQUENT TO THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S SEVENTH AMENDMENT RIGHT AND WERE CAUSED BY THAT DENIAL.

Petitioner was subjected to a non-jury trial in a highly charged atmosphere. Counsel for petitioner conceded that his client was charged with "what is tantamount to a crime" and said he had not had an opportunity to reply to the allegations of fraud at the time of the trial.[3] Counsel for respondent summarized the allegations of fraud and perjury and referred to a political opponent of

[3] C.A. App. at 110.

Defendant Caliguiri, suggesting that an alliance existed with petitioner.[4]

Thereafter, counsel for respondent stated:

> MR. MANION: So, Your Honor, with that, with the convincing documentary experts, the evidence that would be demonstrated on slides and through other devices is overwhelming. With this corroborative evidence, we have an out-and-out case of fraud, forgery and, I believe, perjury.[5]

The trial court then warned of the possible result of the non-jury trial it was about to conduct:

> THE COURT: Well, if your allegations are correct, they raise a host of problems for a number of courts and a number of branches of government: The Executive Branch, the Judiciary, and certainly the State Court.
>
> I think the allegations are serious enough that they require a hearing; and even if you would consent to the dismissal of these actions, I would not approve it.[6]

In such an atmosphere of intimidation, it is obvious why petitioner chose to stand on its right to judgment by its peers rather than by the court.

Respondents' contention (Br. in Opp. 16-17) that petitioner's jury trial argument will be unavailing, given the evidence presented at trial, is unwarranted. Although trial counsel informed the district court that he had "a very strong case" [7], he did not have adequate time to prepare, and in light of the court's refusal to impanel a

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[4] C.A. App. at 131.

[5] C.A. App. at 133.

[6] C.A. App. at 133-34.

[7] C.A. App. at 115.

jury, decided to present only a limited defense.[8] Moreover, whether petitioner's president should have testified, and whether experts for the petitioner had adequate time to prepare (see Br. in Opp. 10) is irrelevant when a Constitutional right has been previously denied. Similarly, statements by petitioner's trial counsel made *dehors* the record and after an unrelated dispute between the attorney and petitioner (see Br. in Opp. 9) are not relevant to this case. They do not establish what a jury would have concluded if petitioner's rights had not been denied.

IV. THE CASE IS NOT MOOT.

The respondents refer (Br. in Opp. 11, 12) to certain events which occurred in the district court *after* the petition for certiorari was filed in this Court, and assert that a motion is "pending" in the district court to dismiss petitioner's legal claim, together with a commitment regarding disposition of this case. This is not correct, and any uncertainty suggested by the Brief in Opposition has been clarified by subsequent action of the district court. See Appendix to this Reply Brief, *infra*, pp. 1a-3a.

In fact, no motion to dismiss was ever filed. See App., *infra*, p. 1a. Settlement discussions did take place, but no agreement was reached. Trial counsel was not authorized to dismiss petitioner's damage claim, nor did he do so. See App., *infra*, pp. 1a-2a. As the materials in the Appendix to this Reply Brief show, any verbal comment to the contrary made by trial counsel at the pre-trial conference has been found to be "unauthorized" and has been "rescinded" by the court. See App., *infra*, p. 3a. Thus the episode recounted in the Brief in Opposition is now irrelevant and has no bearing on the fundamental question raised on this record, namely the protection of petitioner's constitutionally guaranteed right to trial by jury.

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[8] C.A. App. at 110.

CONCLUSION

This case is not moot. It presents for decision a constitutional question of enduring significance.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1982

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI, *et al.*,
Defendants

MOTION TO WITHDRAW PROPOSED MOTION TO DISMISS

AND NOW, comes the Plaintiff, Jonnet Development Corporation, by its attorney, F. Peter Dixon, and moves your Honorable Court to permit the withdrawal of a draft Motion to Dismiss from consideration and to relieve Plaintiff of any prior committment regarding same, based upon the following:

1. On June 28, 1982, counsel for the Plaintiff, at a pretrial hearing, indicated to the Court that it was the intention of the Plaintiff to file a Motion to dismiss the action at law for money damages regarding the captioned case and that such Motion would be filed at some time in the future regardless of the ruling of the Supreme Court of the United States concerning a pending Petition for Writ of Certiorari.

2. At the time of making the aforesaid representation, counsel for the Plaintiff believed in good faith that he had authority to do so from Elmer Jonnet, president of the Plaintiff corporation, when in fact, due to a misunderstanding among counsel for the Plaintiff, appellate counsel for the Plaintiff in the Supreme Court and the president of the Plaintiff, such authority had not been

given and the aforementioned representations to the Court and to the parties were without authority.

3. Upon discovering the above, counsel for the Plaintiff consulted appellate counsel to verify the facts and obtain the Affidavits attached in support of this Motion.

4. Plaintiff will be prejudiced if held to the unauthorized committment made in error by counsel for the Plaintiff.

WHEREFORE, Plaintiff requests your Honorable Court to remove from consideration the draft copy of the Motion to Dismiss previously submitted and further to rescind the unauthorized committment of Plaintiff's counsel with regard to said Motion to Dismiss.

/s/ F. Peter Dixon
F. PETER DIXON, ESQUIRE
Attorney for Plaintiff

Filed: August 9, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI, *et al.*,
Defendants

ORDER OF COURT

AND NOW, to-wit, this 30th day of August, 1982, upon consideration of the within Motion and after hearing thereon, it is hereby Ordered that the Plaintiff, Jonnet Development Corporation, is hereby granted leave to withdraw the draft Motion to Dismiss informally circulated among the Court and the parties to this action, without prejudice, and further any committment to dismiss any part of the within cause of action made by counsel for the Plaintiff is rescinded as unauthorized.

/s/ Donald E. Zeigler
J.